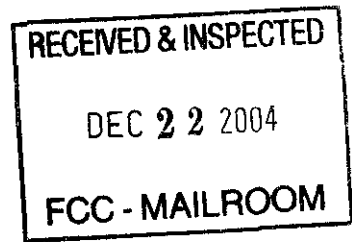


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Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the matter of	)	
Amendment of Section 73.202(b)	)	
FM Table of Allotments	)	MM Docket No. 02-212
FM Broadcast Stations	)	RM-10516
(Vinton, Louisiana, Crystal Beach,	)	RM-10618
Lumberton, and Winnie, Texas)	)	

To: Commission

APPLICATION FOR REVIEW

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Amendment of Section 73.202(b)	)	MM Docket No. 02-212
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FM Broadcast Stations	)	RM-10618
(Vinton, Louisiana, Crystal	)	
Beach, Lumberton, and Winnie,	)	
Texas)	)	

To: The Commission

APPLICATION FOR REVIEW

1. Pursuant to Section 1.115 of the rules, Charles Crawford seeks Commission review of the Media Bureau's Report and Order released November 26, 2004 in MM Docket 02-212 ("Bureau Reconsideration Decision")<sup>1</sup> that denied his Petition for Reconsideration and terminated the rulemaking proceeding in which (a) the FM channel of an existing, powerhouse Houston market FM radio station is "re-assigned" to Lumberton, Texas on the premise that it will serve as the first local outlet of that community while (b) denying Mr. Crawford's proposal to allot an FM channel as the first local outlet for the community of Vinton located in rural Louisiana.

QUESTION PRESENTED

2. Did application of the Commission's "Tuck" FM allotment policy<sup>2</sup> -- to accord a 307(b) "first local outlet" public

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<sup>1</sup> The Bureau's earlier Report and Order released May 4, 2004 is referred to as the "Bureau Initial Decision". The cumulative effect of the Bureau Initial Decision and the Bureau Reconsideration Decision is sometimes referred to as the "Bureau action".

<sup>2</sup> Faye v. Richard Tuck, 3 FCC Rcd 5374 (1988).

interest status to a small community imbedded in a corner of the Houston market, solely by reassigning to that community the existing authorization of a long established full Class C FM metro station -- in a decisional 307(b)<sup>3</sup> preference over a genuine first local service for a deserving rural community -- provide the reasoned explanation required under the Administrative Procedure Act, 5 U.S.C. §§557(c), 706, and Motor Vehicle Manufacturers Association v. State Farm Insurance Company, 463 U.S. 29 (1983)?

#### BASIS FOR COMMISSION REVIEW

3. The action of the Media Bureau taken pursuant to delegated authority (a) violates the Administrative Procedure Act, (b) rejects a challenge to the lawfulness of the "Tuck" FM allotment policy on grounds that to our knowledge have not been addressed by the Commission and (c) involves application of the "Tuck" FM allotment policy that should be overturned or reversed. 47 C.F.R. §1.115(b)(2)(i)-(iii).

#### SUMMARY

4. This case pits the interests of a giant broadcaster (Tichenor) in the Houston-Beaumont radio markets at the expense of bringing a first local radio outlet to a deserving independent community (Vinton) in a neighboring state. It involves a "smoke and mirrors" switch of licensed communities to block the legitimate preference for the first local outlet at Vinton. This

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<sup>3</sup> Section 307(b) of the Communications Act, 47 U.S.C. §307(b).



maneuver has no genuine 307(b) purpose; to the contrary, it involves a "Morningside" gutting of the FM process.<sup>4</sup>

5. If the Bureau's action is allowed to stand, it would siphon still more FM spectrum into the maw of major market radio at the expense of an allotment for underserved rural America.

6. The Bureau's action illustrates the no-man's land of factors under the Tuck policy, to our knowledge never tested in the courts, that are so nebulous and subjective as to be arbitrary and capricious under the Administrative Procedure Act.

#### ARGUMENT

7. The Bureau's action, without the reasoned explanation required under Motor Vehicle Manufacturers Association v. State Farm Insurance Company, 463 U.S. 29 (1983), rules in favor of the major market interest and against the small town, rural interest.

#### I.

Contest between (a) a straight-forward Class A FM allotment as the first local outlet for a desiring rural community and area, and (b) a contrived proposal by a long-standing powerhouse full Class C FM station in the Houston market premised on becoming the "first local outlet" for a tiny community in the market

8. We start with the small town, rural interest. Vinton is a stand-alone town, 2000 US Census population 3,338, in rural Louisiana. A Class A frequency is proposed as its first local radio station. The closest radio market is the Lake Charles, Louisiana market, ranked 205th in the nation. Broadcasting &

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<sup>4</sup> In which an allotment to the tiny community of Morningside, Maryland, became the top-rated Infiniti outlet in the Washington-Baltimore radio markets.

Cable Yearbook, 2001, at D-722. While the Vinton station will likely be a part of that market, it will be on the fringe, some 25 miles from Lake Charles beyond the reach of a Class A signal which will cover only 5% of the Lake Charles Urbanized Area. This is a classic case where a relatively small rural community deserves to have its own local outlet for expression.

9. Tichenor License Corporation (Tichenor) owns and operates a number of AM and FM radio stations in the Houston and Beaumont markets. The Houston/Galveston radio market is the nation's 10th largest, with 4.6 million population in the Arbitron survey area. Broadcasting & Cable Yearbook, 2001, at D-721. The Beaumont/Port Arthur radio market is the 130th, with population of 587,000 in the Arbitron survey area. *Id.* at D-719. For both markets combined, the potential reach is more than 5 million people.

10. Tichenor owns at least two full Class C FM stations in the Houston and Beaumont markets. One is KOBT, formerly KLAK, licensed to Winnie, Texas, a small community located to the east of Houston. The other is KQBU, licensed to Port Arthur, Texas. These two stations broadcast from the same tower, centrally located between Houston and Beaumont. They operate with maximum radiated power and from antennas some 1,800 feet above average terrain. Their coverage areas are enormous. Coverage maps and related information are attached as Exhibit 1.

11. Tichenor's counterproposal to the allotment petition for a first local outlet to serve Vinton and surrounding rural

areas has two elements. One has a legitimate 307(b) purpose. The other does not. We shall start with the legitimate one.

12. Tichenor owns a Class A station, KLTO, in Crystal Beach, Texas, along the Gulf Coast, operating on channel 287 which is the same channel proposed for Vinton. Channel 287A at Crystal Beach clears with channel 287A at Vinton. In the counterproposal, Tichenor would upgrade KLTO to channel 287C2 and move its transmitting location in the direction of Beaumont, closer to Vinton, which does bring its channel 287C2 in conflict with the Vinton channel 287A. There would be a gain (net after deducting losses) of 270,000 population added to the megamillions served by Tichenor stations in the Houston and Beaumont markets. There is no basis to quarrel with a fair and square choice between these two 307(b) proposals. Under such a choice, Vinton would prevail because a first local outlet is preferred over population gains.

13. We now turn to the objectionable element of the counterproposal. In order to secure its upgrade and population gains, Tichenor needed to deal with the Vinton rulemaking proposal that is blocking it. This required a "first local outlet" for a community of license having more people than Vinton (3,338). There is nothing subtle about the strategy employed.

A. Step one. For the KLTO upgrade on channel 287C2, there was no plausible need or reason to change the station's community of license, i.e., Crystal Beach. Nonetheless, the counterproposal package proposes Winnie, Texas, as a new

community of license. This is the same community of license of powerhouse KOBT serving the Houston and Beaumont markets. The population of Winnie (2,914) is less than the population of Vinton (3,338) so this wouldn't block Vinton from prevailing because of its greater population.

B. Step two. Question: Why change the Crystal Beach community of license at all and, if so, why choose Winnie as a new community of license? Answer: Powerhouse KOBT is the only station licensed to Winnie and Commission policy is against removing a community's only licensed station. So, by providing Winnie an alternate licensed station, this would free up KOBT to change its community of license. Which the counterproposal package proposes to do, to a community named Lumberton, Texas, up the road a little ways from Winnie, with the requisite population (8,731) exceeding that of Vinton.

14. The community of license strategy, thus, goes from Crystal Beach to Winnie to Lumberton. A regulatory Tinkers to Evers to Chance.<sup>5</sup> Tichenor isn't changing the channel on which powerhouse KOBT operates or its full Class C allotment in the Commission's Table or the high powered and strategically located technical facilities in any way. It will remain a dominant metro station unaffected by whether its community of license is Winnie or Lumberton or any of the hundreds of other communities within

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<sup>5</sup> The Bureau was confused by this strategy, requiring Tichenor to file a statement regarding errors in assigning the wrong channels to the various communities and the issuance of a corrective supplement to the Bureau Initial Decision.

its huge service area. The only thing that will change is the name of the community on its station license. And the only rational purpose for the strategy is that the Lumberton population (8,731) exceeds the population of Vinton (3,338) whereas the population of the station's present community of license, Winnie (2,914), does not.<sup>6</sup>

15. To be sure, there can be valid changes in a community of license without changes in the channel or technical facilities, including cases cited in the Bureau Initial Decision at fn. 7. However, such cases have a genuine 307(b) improvement in the deployment of the spectrum that stands in full decisional contrast with the strategy here, i.e.: To serve an Indian Reservation in a remote rural area, Oraibi and Leupp, Arizona, 14 FCC Rcd 13547 (1999). To move a second local station from a smaller community to a larger community as its second local station, Akeny and West Des Moines, Iowa, 15 FCC Rcd 4413 (2000). To move the 7th local station to a community as its first local station, Kankakee and Park Forest, Illinois, 16 FCC Rcd 6768 (2001). To move one TV channel as a first local service, leaving the departed community with three other local TV channels, El Dorado and Camden, Arkansas, 14 FCC Rcd 9564 (1999).

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<sup>6</sup> In another case, when the shoe was on the other foot, Tichenor criticized an opposing party's attempted similar maneuver, calling it "entirely gratuitous" and "disingenuous." Galveston and Missouri City, Texas, MM Docket No. 99-284, Comments of Tichenor License Corporation, dated November 8, 1999, copy in the record of this proceeding as Exhibit A to Reply Comments of Charles Crawford filed January 6, 2003.

## II.

The Commission's "Tuck" allotment policy is impermissibly subjective and, as applied to the facts and circumstances here, the policy is arbitrary and capricious, lacking reasoned decisionmaking as required by law

16. Tichenor wants the Commission to accept the premise that its powerhouse KOBT serving the Houston and Beaumont markets, after all these years, is going to become the first local outlet for the tiny community of Lumberton located in a corner of one of those markets. Right. How is it that parties can present such a scenario to the agency and, instead of being ushered out the door, the Commission accepts it, lock, stock and barrel. The answer lies in something called the Tuck policy.

17. We are reminded of a protocol of the State Department. During the 1800's and early early 1900's when our nation was actively acquiring interests in islands and territories in competition with nations such as England and Spain, statutes and other documents would at times provide that a given island or territory was "appertaining" to the United States. E.g., 48 U.S.C. §1411 regarding Navassa Island in the Caribbean near Cuba shortly prior to the Spanish-American War. The State Department explains the meaning of "appertaining" in this way: "The use of the word 'appertain' is deft, since it carries no exact meaning and lends itself readily to circumstances and the wishes of those using it." Sovereignty Study of State Department, 1931-1932, at 145-146 (copy attached as Exhibit 2 for handy reference). So, too, here, with respect to the Commission's Tuck policy.

18. The Tuck policy is a menu of wildly subjective

criteria: (a) The extent to which the community residents work in the larger metropolitan area; (b) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (c) whether community leaders and residents perceive the specified community as being an integral part of, or separate from the larger metropolitan area; (d) whether the specified community has its own local government and elected officials; (e) whether the smaller community has its own telephone book provided by the telephone company or zip code; (f) whether the community has its own commercial establishments, health facilities, and transportation systems; (g) the extent to which the specified community and the central city are part of the same advertising market; and (h) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools and libraries. Faye and Richard Tuck, 3 FCC Rcd 5374 (1988).

19. The kaleidoscope of combinations of facts and circumstances under these criteria is virtually endless. But there is more. All eight factors need not favor the applicant. If a majority of the factors favor the specified community and a minority are unfavorable, the specified community can be awarded the allotment. Id.; Parker and Port St. Joe, Florida, 11 FCC Rcd 1095, ¶¶9-11 (1996). So, there are kaleidoscopes of combinations of facts and circumstances both for and against the specified community.

20. But there is still more. Nowhere amongst this no-man's land of subjective facts and circumstances is there provision for the most crucial consideration of all, i.e., a determination of the reasonable likelihood that a broadcast station with a signal serving the central city or metropolitan area will in truth serve as a meaningful local outlet for a designated licensed community.

21. We don't know if the Morningside situation (in which tiny Morningside, Maryland (2000 U.S. Census population 1,925) is the home of the top ranked station in the Baltimore-Washington market) was a product of the Tuck policy. But the Morningside case is symptomatic of the need to consider the reasonable likelihood of a meaningful local outlet for the smaller community in a major market in the Tuck line of cases. For many years now, the Morningside example involving Infiniti's controversial and popular station has been a public fact of life in the Washington, D.C. area for the Commission and its staff to observe and alert them to this flaw in the Tuck allotment policy.

22. In a case that is currently pending before the United States Court of Appeals for the District of Columbia Circuit, Benjamin and Mason, Texas, Commission Memorandum Opinion and Order, released January 8, 2004, MM Dockets 01-131 and 01-133, sub nom. Crawford v. FCC and United States of America, No. 04-1031, and in a case that is currently pending before the Commission, Quannah, Texas, et al, Application for Review<sup>7</sup> of

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<sup>7</sup> Filed by Rawhide Radio, LLC, Capstar Tx Limited Partnership, CCB Texas Licenses, L.P., Clear Channel Broadcasting Licenses, Inc.



Bureau Memorandum Opinion and Order, released April 27, 2004 in MM Docket No. 00-148, where the Bureau denied a counterproposal on technical grounds, while upholding Tuck decisions on the premises (a) that a full powered Class C allotment to serve the Dallas-Fort Worth radio market, ranked sixth in the nation, can be favored as a 307(b) first local outlet for a community imbedded in that market named Keller (population 13,683); (b) that a Class C-1 allotment to serve the Austin, Texas, market, the nation's 49th largest, can be favored as a 307(b) first local outlet for a community imbedded in that market named Lakeway (population 4,044); (c) that a Class C-2 allotment to serve the Austin market can be favored as a 307(b) first local outlet for a community imbedded in that market named Lago Vista, Texas (population 2,199); and, (d) that a Class C-1 allotment to serve the San Antonio radio market, the nation's 32nd largest, can be favored as a 307(b) first local outlet for a community imbedded in that market named Converse (population 8,887).

23. Here, Tichenor asks the Commission to accommodate the interests of its powerhouse station in the Houston and Beaumont radio markets by licensing said station as the first local outlet for a similarly small community imbedded in a corner of those markets. This irrational proposition is aggravated by the shell game with communities of licenses of Tichenor stations in an attempt to defeat the Vinton allotment rather than meritorious improvement in the Commission's allotment or deployment of spectrum to serve the public interest under the command of

Section 307 of the Act.

24. The records in allotment proceedings in which the nebulous, subjective Tuck policy is applied, ignoring the realities of the radio marketplace, permit the agency to come down for or against any allotment. The policy essentially boils down to what the agency wants the policy to mean. For sure, that is true in the case of the "reasoned" agency decision-making under the Tuck policy pertaining to Lumberton. The Bureau's Initial Decision at ¶6 - in its entirety - consists of the following:

"...Tichenor has provided a showing that Lumberton is independent of Beaumont under the factors set forth in Faye and Richard Tuck. See 3 FCC Rcd 5374 (1988)."

This is not the first Commission case to dispose of the Tuck analysis in such a summary fashion devoid of any analysis whatsoever.<sup>8</sup> See, e.g., Report and Order of Media Bureau, released July 24, 2003, MB Docket 03-105 (Malta, New York) at ¶4 and n. 4; Report and Order of Media Bureau, released May 18, 2001, MM Docket 00-225 (White Oak, Texas) at ¶1; Report and Order of Media Bureau, released September 5, 2003, MB Docket No. 03-419 (Tybee Island, Georgia) at ¶4.

25. The Tuck policy is better suited to the art of diplomacy than to compliance with the rigors of decisionmaking

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<sup>8</sup> The revisionist passage in the Bureau Reconsideration Decision at ¶4 cannot erase the fact that in this case and in other cases, the Commission, left to its own devices, believes it can apply the Tuck policy any way it wants to in such a one sentence summary statement.

under Motor Vehicle, supra, and the Administrative Procedure Act.

### III.

The Commission should evaluate the efficacy of its "Tuck" policy as historically applied to new entrants in an urbanized area in light of the study of "Tuck" decisions in the record of this proceeding and also in light of the inherent potential for a Morningside undermining of the allocation process

26. The United States Court of Appeals has held that it is incumbent on a federal agency to monitor the effectiveness of its rules and policies in relation to its regulatory duties and responsibilities. Bechtel v. FCC, 10 F.3d 875 (D.C.Cir. 1993). In that regard, the record in this proceeding contains a "Study of Reported Decisions by the FCC Applying the Tuck Precedent to Determine Whether to Grant or Deny a 'First Local Service Status' in FM Allotment Rulemaking Proceedings."

27. This study reflects that during the period from September 1995 to August 2004, at least 54 reported decisions applied the Tuck policy.<sup>9</sup> One reported decision, in 1999, denied first local service status to the community of Lolo, Montana (population 2,747) located in the urbanized area of Missoula, Montana. In all of the other 53 reported decisions studied, the Commission granted first local service status to the community for which such status was requested. The Tuck factors could be and in fact were applied to support the first local service status without fail, whether involving small proposed

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<sup>9</sup> An effort was made to find all such reported decisions although we cannot say that other reported decisions do not exist. We have excluded cases in which there is a reference to a Tuck submission, but the case was decided on other grounds

communities of license (such as Leupp, Arizona, population 857, and Gurley, Alabama, population 876), large proposed communities of license (such as Sunnyvale, California, population 131,760, and Hoover, Alabama, population 62,742), small urbanized areas (such as the Hyannis, Massachusetts, and Clarksville, Kentucky, urbanized areas) or large urbanized areas (such as the Chicago, Dallas-Fort Worth and Atlanta urbanized areas).

28. Since 1995, a favorable Tuck result has been available to the party seeking first local service status virtually for the asking. Moreover, the case in which a first local service status was denied in 1999 is indistinguishable from the other cases in which the status was always granted. Compare, e.g., Report and Order of Media Bureau, released November 30, 1999, MM Docket No. 97-203, denying 307(b) first local service status, to Lolo, Montana, population 2,746, located 12 miles from the center city in the urbanized area, Missoula, Montana, population approximately 42,000, with Report and Order of Media Bureau, released February 9, 2004, MM Docket No. 02-79, granting 307(b) first local service status to Park City, Montana, population 870, 21 miles from the center city in the urbanized area, Billings, Montana, population 89,847.

29. We have given examples of decisions, like the Bureau Initial Decision, providing no analysis whatsoever. A variation on this practice is to number the 8 Tuck factors and then refer to numbers leading to the decision without any analysis, e.g., Report and Order of Media Bureau, released June 23, 2003, MM

Docket 01-175 (Fletcher, North Carolina) at ¶3 and n. 6. Sometimes there is an extended analysis, e.g. Report and Order of Media Bureau, released November 29, 1996, MM Docket No. 95-175 (Newcastle, Oklahoma) at ¶3. However, many if not most times, the analysis is a relatively concise statement similar to the revisionist statement supplied in the Bureau Reconsideration Decision here, often in a footnote. But, whether there is no analysis, a brief analysis or a more extended analysis, the result is always the same. With the single exception noted, the Tuck policy always favors a 307(b) first local service status for the subject community.

30. There is something wrong here. As indicated in ¶21, supra, the Morningside example is a warning sign to the Commission regarding the actual service orientation of stations in small communities having facilities reaching into the center city of an urbanized area. All Tuck cases involve this relationship since Tuck does not apply to situations located outside of any urbanized area. This recurring truth about the attraction of the center city applies to major markets included in the survey such as Phoenix, Oklahoma City, Dallas-Fort Worth, Columbus, Ohio, Des Moines, Austin, Texas, Atlanta, Houston, Minneapolis-St. Paul, Kansas City, Chicago, Charlotte, San Jose, Birmingham, Jacksonville, Indianapolis, Orlando, Salt Lake City, Portland, Seattle and Louisville. It applies to lesser markets such as Denton, Lubbock and Waco, Texas, Little Rock, Myrtle Beach, Spokane, Flagstaff, Binghamton, Corpus Christi, Flint MI,

Panama City, Albany, Kingsport TN, Tuscaloosa, Goldsboro NC, Asheville NC, Athens GA, Huntsville and Columbia SC. It can even apply to small markets as well, such as Hyannis MA, Clarksville TN-KY, Stuart FL, Longview TX, Billings MO, Prescott AZ and Cheyenne WY.

31. There are no metes or bounds to the policy. The door is wide open. Virtually all Tuck cases are won by the proponent. In many of those cases, probably most of them, there is the inherent Morningside seed and temptation to seek the overall market audience rather than in fact serving as a first local outlet. Maybe we are wrong and the FCC has conducted a study of the efficacy of the Tuck policy which is being applied so routinely because the study shows that the policy is working so well. But we don't think so. We have never heard of such a study which surely would have been mentioned in the case decisions. If no study has ever been made -- considering the many major markets that are involved in the Tuck cases and taking into account the relative guarantee that submitting a Tuck showing will win the case -- the chances are that the policy has spawned and is continuing to spawn more than a few Morningsides across the countryside.

#### IV.

To apply the "Tuck" policy on a contrived premise that an established major market station may be accorded a decisional "first local outlet" status for a tiny community in its existing market is wildly devoid of rational thought

32. Virtually all of the 54 reported decisions that were studied involved an effort to establish a new station in -- or

move an existing station into -- a community that is relatively small in relation to the urbanized area in which it is located. The proponents of the 307(b) first local station status are newcomers or existing stations seeking to establish a new or expanded broadcast service within the urbanized area.

33. None of the 54 reported decisions involves -- or stands as precedent for -- the use of Section 307(b) here with regard to the Houston radio market and in other current cases with regard to the Dallas-Fort Worth, San Antonio and Austin radio markets, in which a long established dominant radio station in the market whose economic interests will demand continued programming service that has led to such dominance, seeks decisional 307(b) credit for proposing to be the first local radio service for one of hundreds of small communities within its market. Considering the total implausability of any such situated station ever really doing this, these efforts take the amorphous and undisciplined Tuck policy described in B above to a new, surreal level.

34. We are reminded of a line spoken by Jack Nicholson in the Academy Award winning movie, *Is This All There Is*, starring Helen Hunt as the female lead. Mr. Nicholson played the role of a successful author of novels about women who in his personal life, until ultimately brought to heel by Ms. Hunt, was given to sarcasm. A young female admirer upon meeting him and seeking an autograph asked, how can you be so perceptive about the way women think and feel? He responded, I envision how men think and feel, and then remove all semblance of reason. So, too, here. The

efforts of long established powerhouse radio stations in the Houston market, also the Dallas-Fort Worth, San Antonio and Austin markets, to claim first local service credit under Section 307(b) for tiny communities within their metro service areas take the already dubious Tuck policy and then remove all remaining semblance of reason.

## V.

Our brief addresses the 307(b) "first local outlet" status erroneously granted in the Bureau's action, not multiple ownership or other collateral issues

35. The Bureau Reconsideration Decision at ¶5 takes the position that it would not be conducive to the efficient transaction of Commission business to expand the scope of the allotment proceeding as sought by Mr. Crawford, citing Tylertown, Mississippi, 14 FCC Rcd 4057 (MMB 1999); also, that to the extent Mr. Crawford suggests a violation of the multiple ownership rules, it is established policy not to consider multiple ownership issues in allotment proceedings, citing Detroit Lakes and Barnesville, Minnesota, and Enderlin, North Dakota, MM Docket 00-53, Memorandum Opinion and Order (MMB), released December 16, 2002, and Letter from Peter H. Doyle, Acting Chief, Audio Services Division, to Paul A. Cicelski (corrected spelling), Esq. et al, dated May 24, 2001, File No. BAPH-20001101ABD (corrected file number). Neither of these positions has merit.

36. In the Tylertown case, the Commission held that allegations that the petitioning party was not the real party in interest or did not have bona fide intentions of building the station or had filed the petition to influence negotiations for